## (2) Southwestern Bell Mobile Systems

February 16, 1995

## Via Hand Delivery

Steven A. Portney Attorney

Mr. William F. Caton Office of the Secretary Federal Communications Commission 1919 M Street, N.W. Stop Code 1170 Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re:

RM 8577; In the Matter of Amendment of the Commission's Rules to Preempt State and Local Regulation of Tower Siting for Commercial Mobile Radio Service Providers, CTIA Petition for Rule Making.

Dear Mr. Caton:

Enclosed for filing in the above-referenced proceeding are an original and three (3) copies of the Comments of Southwestern Bell Mobile Systems, Inc. Please file these Comments among the papers in this proceeding.

Please return a file-marked copy of the Comments to our courier.

Thank you for your assistance.

Sincerely

SAP:rlm

enclosure

Steve\Letters\Caton

17330 Preston Road Suite 100A Dallas, Texas 75252

Phone 214 733-2116

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## **BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION OFFICE OF SECRETARY



WASHINGTON, D.C.

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Amendment of the Commission's		
Rules to Preempt State and Local )	RM 8577	
Regulation of Tower Siting For )		
Commercial Mobile Radio Service Providers )		DOCKET FILE COPY ORIGINAL

## **COMMENTS OF** SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Wayne Watts Vice President, General Attorney

Steven A. Portnoy Attorney

17330 Preston Road Suite 100A Dallas, Texas 75252

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#### **SUMMARY**

Southwestern Bell Mobile Systems, Inc. fully supports the proposal in the Cellular Telecommunications Industry Association's Petition For Rule Making filed on December 22, 1994 that forms the basis of this proceeding.

It is well documented and supported that the Federal Communication Commission has the authority, indeed, the obligation to ensure the development of an efficient mobile services infrastructure subject to uniform, federal regulation. Sections 332 and 2(b) of the Communications Act, as amended, ("Act"), grants the Commission the authority to preempt state and local regulation of tower site location and management. In order to carry out the mandates of the Executive Branch, Congress and the public, in providing an information super highway which is in the best interest of the public as a whole, the Commission must act to eliminate the undue costs, burdens and delays of local and state zoning ordinances and regulations. This is particularly true where, as here, many of the ordinances are antiquated and have the effect of barring the construction of necessary sites by the commercial mobile radio service providers. Absent this preemption, the public interest will not be satisfied, leaving the industry and consumers to suffer higher costs and delays in the implementation of valuable services.

<sup>&</sup>lt;sup>1</sup>47 U.S.C. §§ 152(b), 332.

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Commercial Mobile Services Providers	j	

To: The Commission

## COMMENTS OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

NOW COMES, Southwestern Bell Mobile Systems, Inc. ("SBMS") and files this its comments in support of the Cellular Telecommunications Industry Association's ("CTIA")

Petition for Rulemaking. SBMS is the largest commercial mobile radio service provider in the United States, providing cellular service to over three million (3,000,000) subscribers in over 61 markets. SBMS is also an active bidder in the current auctioning of Personal Communication Service ("PCS") spectrum.

In developing and growing its communications facilities, SBMS contributes billions of dollars in capital expenditures for its commercial mobile radio service ("CMRS") infrastructure in meeting the demands of the public and the mandates set by the Commission in providing service under its authorized licenses. SBMS is faced with many diverse, antiquated and disparate local and state zoning ordinances and regulations in hundreds of jurisdictions across the country which range from an absolute moratorium on construction of new towers or placement of rooftop

antennas to burdensome delays and costs in obtaining necessary approvals prior to construction.

These inconsistencies cause the CMRS providers to incur millions of dollars in additional costs of labor, attorney fees, redesigning and reconfiguration of network engineering, lost revenue and lower quality service to the public.

#### INTRODUCTION/POSITION

SBMS will not reiterate in full the legal arguments for federal preemption which have been persuasively presented by CTIA in its Petition for Rulemaking. Rather, SBMS will provide the Commission illustrative, but by no means exhaustive, examples of the millions of dollars of costs and undue delays imposed on CMRS providers by the current patchwork system of burdensome and inconsistent local and state regulatory barriers.

Section 332 of the Communications Act expressly prohibits states from regulating entry into mobile services. Section 332 of the Act, as revised by the Omnibus Budget Reconciliation Act of 1993, represents the culmination of Congressional support of this Commission's efforts to foster the competitive development of mobile services. By its revision, Congress refined federal regulatory policy governing mobile services to ensure the development of an efficient, federally-regulated, competitive mobile services marketplace. As stated in CTIA's Petition, the Commission possesses authority to preempt state regulation to prevent the negation of legitimate mutual policy objectives which is additionally supported by the Supremacy Clause which empowers Congress to preempt state and local laws. Congress may confer such power upon federal agencies, and has done so in this instance. The Commission must act where the state law stands as an obstacle toward accomplishing the objectives of Congress.

Previous preemptive action taken by the Commission with respect to radio services further supports CMRS tower preemption. The Commission in balancing the competing interests between local jurisdictions exercising their police powers and the need to promote legitimate federal objectives, adopted rules to limit state regulation of earth stations, amateur radio antennas, as well as multichannel distribution services.<sup>2</sup> The Commission recognized statutory objectives supporting rights reasonably necessary to receive unhindered interstate communications. As a result, the Commission adopted rules that preempted local regulations.

Another example of the Commission's exercise of its preemptive powers under § 25.104,<sup>3</sup> relate to home satellite dishes. The Commission tentatively concluded that it possessed preemptive authority because local regulation stood as an obstacle to accomplishing a legitimate Congressional purpose. Specifically, the Commission had observed that without satellite antennas, the domestic satellite services licensed by the Commission were useless. Such a situation is very analogous to the matter at hand in that the CMRS licenses issued and to be issued pursuant to auctions could in essence be worthless or otherwise extremely cost prohibitive, if local and state regulation continues to impede construction of CMRS facilities. When state or local regulations are unreasonably interfering or frustrating that right or the provisions of the Communications Act or Commission rules, preemption is not only permissible but essential.

Analogous to the construction of the information super highway, was the development of

<sup>&</sup>lt;sup>2</sup>In affirming the Commission's right to preempt a state from regulating as a cable television system a master antenna television system ("MATV") which delivered MDS signals, the Second Circuit found that MDS in general was interstate and therefore Section 2(b) was not applicable. New York State Commission on Cable Television vs. FCC, 669 F2d 58, 65 (2nd Cir. 1982)

<sup>&</sup>lt;sup>3</sup>47 C.F.R. § 25.104

laws creating the interstate highway system. As with the wireless telecommunications network, motor vehicle transportation had become of major importance in the United States, and the construction of an adequate network of highways to serve the transportation needs of the country was critical. Beginning with the enactment of the Federal-Aid Road Act of 1916, the Executive Branch and Congress recognized the great importance of the interstate highway system to the needs of the nation.

Congress found it essential that such development be administered with the utmost efficiency. To that end, Congress recognized the need for uniform, federal regulation to prevent state and local regulations from impeding the development of the interstate highway systems.

Title 23 of the United States Code provided that the states, in the interest of the federal government, had the right through eminent domain and condemnation proceedings to acquire rights-of-way in the prosecution of any project for the construction, reconstruction, or improvement of any section of the Interstate Highway System. Inconsistent state and local regulation was preempted to insure the development of an interstate highway system.

## EXAMPLES OF THE DAMAGING EFFECTS OF STATE AND LOCAL ORDINANCES AND REGULATIONS.

One of the most costly factors in constructing an efficient and viable CMRS network, and often the most burdensome part of the process, is the arbitrary method of obtaining zoning throughout numerous local jurisdictions. SBMS has incurred hundreds of thousands of dollars of cost and expense, in the form of attorney fees and labor, in attempting to amend various local zoning ordinances. As SBMS provides cellular service in many areas of the country, we face hundreds of state and local zoning ordinances and regulations, all with differing provisions and nuances. The amending of zoning ordinances in these numerous locales is both time consuming and expensive.

In almost all areas of the country wherein SBMS operates, the placement of rooftop antennas and the construction of monopoles or towers must be accomplished through obtaining a special use permit. The procedure for obtaining such a permit involves months of preparation, negotiation, and representation through the public hearing process. A special use permit is not only required in residential areas, but also in most non-residential (industrial and commercial) areas. Yet, as can be seen across the country, telephone poles, power lines, and enormous electric transformers can be placed by right even within residential areas.

Our strategy in amending zoning ordinances has been to work with the local jurisdictions, seeking concessions to place towers and monopoles in commercial and industrial areas, with certain restrictions and limitations, while conceding residential area placement unless there is no viable engineering alternative. Through long term negotiations and meetings, we have obtained some level of success, particularly within the Northeast. We have accepted certain height,

setback, and aesthetic limitations on our monopoles and towers to be able to place such facilities in commercial and industrial zones. We have educated the various local councils and planning and zoning board members as to the benefits which cellular brings to their constituents and communities. We have enlightened various jurisdictions as to the economic benefits which could be obtained by allowing monopoles and towers on public lands and facilities. We have worked very closely with emergency rescue personnel, (fire, police, and ambulance) in upgrading their communications facilities in order to facilitate recognition of the benefits which CMRS can provide. Despite an enormous amount of time and money being invested by SBMS in this effort, the results of such labor and expense have been relatively minor. Since zoning ordinances are so diverse and inconsistent throughout the country, our efforts are ongoing.

In many areas of the country the zoning process can also be the most time consuming part of the construction process of a new cell site. Whereas real estate acquisition and construction can reasonably be accomplished within four to six months, zoning ordinances normally cause an average added delay of one (1) year. Extreme delays can even cause the project to become so cost prohibitive, in both expense and delay, that the forced withdrawal of the planned site may become necessary. Such a result is a disservice to the public in contravention to the Commission's mandate that the public interest be served. Costs directly attributable to burdensome, aging and arbitrary zoning ordinances and regulations run well into the millions of dollars. That measurable sum is increased by the more elusive but legitimate costs of alternative engineering design issues, lost revenue from a cell site being delayed or rejected, lower quality service and lost customers and/or customer satisfaction.

## South Texas Region

In our South Texas Region the impediments to constructing cell sites (monopoles, towers, or rooftop antennas), are imposing. Every projected cell site in a major South Texas city must go through special use consideration and be approved by the City Council. This process entails months of negotiation and discussions involving issues concerning plattings, building set back requirements, environmental studies, and other considerations prior to presentment to three legislative bodies or agencies, including numerous public hearings.

An example of this legislative nightmare is a cell site which was approved by the planning and Zoning Board by an 8 to 1 vote. The planning commissioner, though stating the location was the best ever brought to the Commission, recommended to the opposing homeowners/constituents to seek a moratorium from the City Council until undocumented and vague "health" issues were resolved. The cell site was then voted down by the City Council and indeed an "unofficial" moratorium was placed on the construction of any tower sites within the city. At our expense, SBMS sponsored an independent study of EMF effects of our existing towers in an effort to convince the City Council that the guidelines established by the Federal Communication Commission, with which we complied, were indeed safe. The City has now concurred that the operation of our cell sites poses no health risks. SBMS incurred both indirect and direct costs well in excess of one hundred thousand dollars for this one site, in addition to construction and operation delays in excess of twelve months. This particular site was ultimately unable to be constructed, and the network reengineered to locate a cell site at our current retail sales office. We then had to renegotiate the retail sales office lease, incurring additional expenses and costs, in consideration for permission to place a site at that location. The lost revenue from a

year delay along with diminution of customer satisfaction can never be accurately measured.

A cell site to be located within another South Texas city took over two (2) years to secure due to the City's arbitrary position that there could be no towers within its city limits. Our alternative plan to place antennas on the City's water tower was also rejected. Our continuing effort to serve the public within the City was finally achieved when the City reluctantly allowed us to place a cell site in the City maintenance yard, with the additional caveat of donating \$10,000 to the City to build a fence around the entire maintenance yard.

## Midwest Region

The Midwest, inclusive of the metropolitan and surrounding areas of St. Louis and Kansas City, Missouri, faces no less restrictive zoning ordinances and regulations than does South Texas. One example of the unduly burdensome delay and cost attributed to these ordinances occurred when we attempted to place a tower in a St. Louis suburb. A lease was executed in September of 1991 and was subsequently terminated in October 1992 because the City Council and zoning board refused to grant permission to construct a tower in an industrial and commercial district. The site was rejected by the Department of Planning and City Council due to allegations at the public hearing that several military personnel in Operation Desert Storm were losing hair, and were attributing that loss to RF concerns. We attempted to educate and negotiate with the City to obtain permission to construct the cell site. The City suggested we locate outside their city limits. This situation represents both the lack of logic in the highly emotional political arena, and its effect on the provision of quality CMRS. This example represents costs and expenses incurred of over \$100,000 as well as a one-year delay in lost revenue and service to customers.

Ultimately, we relocated the proposed site.

Another example involves a cell site proposed in a suburb of Kansas City. In March, 1994 we submitted a letter to the Planning Staff to review two possible locations in commercial districts. The Staff, without explanation, rejected the proposals and recommended we lease property from a church and construct a bell tower to conceal the antennas. The cost involved in building the bell tower, as suggested, was in excess of \$75,000. Pursuant to the Staff's recommendation, a lease was obtained and our application was submitted. The Planning Staff, though previously recommending this site, opposed our application. Our special use permit hearing has now been continued to March, 1995 due to the Staff's unfounded objections. This inconsistency demonstrates the difficulty which we face in an extremely unstable political environment. The projected increase in costs will be well over \$200,000. Though initially recommended by the Staff, a permit has not been issued nor has the tower been constructed.

Also, a major city within our Midwest Region, does not have an existing zoning classification that allows for the construction of a communications tower above fifty feet. To date, each proposed site requires special zoning relief through the Board of Adjustment and/or the Planning Commission. As with our Northeast Region we are currently working with this City to amend its zoning ordinances.

### New York Region

An interesting example of enormous costs and delay due to the actions or inaction of a city comes from New York, where we proposed a cell site in an upstate town. Unknown to SBMS, our competitor, Nynex, also applied for cell site locations in different parts of the Town. We filed

our required special permit zoning application in March, 1994 after spending over four (4) months for real estate acquisition. The Town then spent months attempting to force a co-location with Nynex even though the engineering design would not allow for such co-location. Subsequently, the Town then determined on its own that both of our sites were deemed to be a "major action" through the state's Environmental Quality Review Process (SEQR). There was no opposition to the towers voiced by any constituent during these months of delay forced upon us by the Town, despite numerous public hearings and unfounded requests for environmental impact statements. Finally, in January 1995, well over eighteen (18) months from the date we executed a lease, the Town granted our special permit. The Town's position was based solely upon the individual Board Members distaste for towers. To our knowledge, Nynex has yet to obtain an approved cell site. The expenses incurred due to this arbitrary delay were enormous. The lost revenue and customer satisfaction are immeasurable.

Another proposed cell site in upstate New York portrays the problems and inconsistent interpretation of antiquated zoning ordinances which have no relation to communications towers or facilities. An extensive cell site search which began in January, 1993 concluded over two (2) years later with the construction of the site in January, 1995. As the local ordinances contained no references to communications towers, internal disagreements and conflicting interpretations within the agencies of the Town caused these delays. Public hearings and meetings with the various boards and agencies consumed well over nine (9) months.

## Northeast Region

The Northeast Region provides an example where a cell site took approximately two years and six different zoning hearings on four different properties, before approval was gained, at an additional capitalized cost of over \$125,000. This process represents the pitfalls encountered due to the personal and completely subjective review of zoning applications. We were twice rejected for a monopole application in an industrial zone to be built approximately fifty feet from an easement of high tension power lines. The process also represented a situation where the mayor suggested our use of a water tank and then subsequently voted against our application filed pursuant to his suggestion.

Every local jurisdiction addresses the issue of towers and telecommunications use in different ways, thereby creating a situation where every county or city has completely different requirements which are often inconsistent, contradictory and subjective. Many jurisdictions require the same extensive zoning approvals whether you are proposing a rooftop application or constructing a tower. We have found, across the country, numerous jurisdictions which ignore or fail to appreciate the Commission and Congressional objectives for nationwide wireless communications. We repeatedly encounter zoning officials who personally disagree with the need for even a second cellular carrier in the market, much less all the entities currently bidding to obtain PCS licenses. The major problem is that many of these misinformed officials have the authority to deny zoning applications without objective reason. We increasingly face unofficial moratoriums and subjective changes in position which unjustly prevent an effective buildout of the network, resulting in diminution of quality CMRS. The lack of uniformity, consistency and logic in the application of various and distinctively different land use regulations and ordinances is a

formidable barrier to the development of a competitive, efficient, nationwide commercial mobile services infrastructure.

#### **CONCLUSION**

It is clear that local and state zoning ordinances and regulations which have been shown to be antiquated, diverse and inconsistent create delays and undue cost, effectively barring the Commission's interest in ensuring the development of a competitive, efficient CMRS infrastructure. As authorized by Sections 332 and 2(b) of the Communications Act, the Commission must exercise its authority in furtherance of its statutory obligations, by preempting state and local zoning ordinances and regulations. The development of a uniform, efficient, federally regulated, competitive CMRS marketplace is dependent upon this preemption.

Respectfully Submitted,

Wayne Watts

Vice President, General Counsel

Steven A. Portnoy Attorney

Southwestern Bell Mobile Systems, Inc. 17330 Preston Road Suite 100A Dallas, Texas 75252